No. 20,771

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

See Vol. 3388

SAYRE & COMPANY, LTD.,
Appellant

v.

A.G. MADDOX, Commissioner of Revenue and Taxation,
Appellee

ON APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF GUAM

BRIEF FOR THE APPELLEE ON REHEARING, AND FOR THE UNITED STATES AND THE GOVERNMENT OF GUAM AS AMICI CURIAE

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This joint brief is filed in response to the Court's order of February 2, 1968. The United States, and the Government of Guam as a party in Atkins-Kroll (Guam) Ltd. v. Government of Guam, 367 F. 2d 127, certiorari denied, 386 U.S. 993, join, as amici curiae, in this brief for the appellee.

PRIOR OPINIONS

The memorandum findings of fact and conclusions of law (I-R. 27-29) 1/ of the District Court are not officially reported. This Court's opinion is reported at 378 F. 2d 372.

1/ "I-R." references are to Volume I of the Record on Appeal.

JURISDICTION

This appeal involves Guam Territorial income taxes for the taxable years ending November 30, 1955, November 30, 1956, and November 30, 1957. On April 2, 1965, the Commissioner of Revenue and Taxation advised the taxpayer of deficiencies in tax for those years in the aggregate amount of $6,137.04. (I-R. 1, 29.) The taxpayer filed a petition with the District Court for a redetermination of those deficiencies on August 30, 1965. (I-R. 1-5.) The judgment of the District Court was entered on December 6, 1965. (I-R. 30.)

The case was brought to this Court by a notice of appeal filed December 28, 1965. (I-R. 32.) Both parties filed briefs and presented oral arguments before Circuit Judges Browning and Duniway, and District Judge Tavares. Pursuant to the Court's *per curiam* opinion of May 5, 1967, the District Court's judgment was reversed on the basis of *Atkins-Kroll (Guam) Ltd.* v. *Government of Guam*, *supra*. Thereafter, the Commissioner filed a petition for rehearing *en banc*. On July 31, 1967, the Court asked the taxpayer to respond to one of the Commissioner's contentions, i.e., that, assuming the *Atkins-Kroll* case to be correct on its facts, it is distinguishable from the instant case. The taxpayer filed an opposition to the petition, and the Commissioner thereafter filed a response. On February 2, 1968, the Court granted the petition for rehearing, ordered the appeal to be heard *en banc*, provided for the filing of supplemental briefs, and invited the

United States and the parties in the Atkins-Kroll case to file briefs. The order noted that the briefs were to consider whether the Atkins-Kroll case was rightly decided and whether the instant case is distinguishable. Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTION PRESENTED

The Guam Territorial income tax law imposes a tax of 30 percent on dividends, interest, compensation, and other types of income received by a "foreign" corporation from sources in Guam. The question presented is whether a corporation incorporated in Hawaii is "foreign" and thus subject to this tax.

STATUTES AND REGULATIONS INVOLVED

The statutes and Regulations involved are set out in the Appendix, infra.

STATEMENT

The pertinent facts are briefly restated for the convenience of the Court. The taxpayer is a Hawaii corporation not engaged in trade or business in Guam. All of its capital stock (except qualifying shares) is owned by John L. Sayre. Prior to 1955, the taxpayer actively engaged in the sale of household appliances in Hawaii under exclusive franchise agreements. In 1954 John Sayre moved to Guam and engaged in the business of selling appliances at retail as Kirby and Company, a sole proprietorship. The taxpayer obtained additional

exclusive franchises for the sale of appliances, permitted John Sayre to sell appliances in Guam under its franchises, and charged him a commission. The taxpayer also loaned John Sayre money and equipment to enable him to begin business in Guam. The taxpayer's activities in Hawaii have declined as John Sayre promoted the Guam business of Kirby and Company. (I-R. 27-28.)

During the taxable years here in question, John Sayre paid the following amounts to the taxpayer (I-R. 28):

Year	Interest	Commissions 2/	Total
1955	$2,000.13	$4,560.00	$6,560.13
1956	2,321.19	4,450.94	6,772.13
1957	2,437.25	4,687.28	7,124.53
		Total:	$20,456.79

The Commissioner determined that these amounts were taxable by Guam under Section 881, Internal Revenue Code of 1954, as made applicable to Guam by Section 31, Organic Act of Guam, c. 512, 64 Stat. 384 (48 U.S.C., Sec. 1421i). Accordingly, he asserted deficiencies in tax against the taxpayer aggregating $6,137.04 -- i.e., 30 percent of the total payments made, $20,456.79. (I-R. 1, 7, 29.) The taxpayers petitioned the District Court for a redetermination (I-R. 1-4) and the court sustained the Commissioner (I-R. 29, 30).

2/ Through inadvertence, the District Court's findings of fact reflect this amount as $4,516. See I-R. 2.

The taxpayer appealed to this Court, contending (1) that Guam's tax laws could not be given extra-territorial effect; (2) that Guam could not impose a gross tax of 30 percent under Section 881 because the taxpayer was not a "foreign" corporation under the Atkins Kroll case and because no provision was made for business expense deductions; and (3) that the tax violated the Fifth Amendment due process and commerce clauses of the Constitution of the United States.

In answer, the Commissioner contended (1) that Guam had jurisdiction to tax the amounts in question because they were derived from Guam sources; (2) that the taxpayer was a "foreign" corporation within the meaning of Section 881 and that the statute and the interpretative Treasury Regulations expressly made no provision for the allowance of deductions; and (3) that the tax was constitutional.

The panel of this Court handed down a per curiam opinion on May 5, 1967, reversing the judgment of the District Court "on the authority of" the Atkins-Kroll decision. 378 F. 2d 372. The Court's order of February 2, 1968, granting the Commissioner's petition for rehearing, noted that the supplemental briefs were to consider both the correctness of the Atkins-Kroll decision and its applicability to the instant case.

SUMMARY OF ARGUMENT

In the Organic Act of Guam Congress made the Internal Revenue Code applicable to Guam as a "mirror" income tax. The Code levies a separate Guam Territorial income tax but the provisions and rates are the same as for the United States income tax. The tax is administered and enforced and its proceeds expended by the Government of Guam, not by the Internal Revenue Service and Congress. As applied to Guam, Section 881 of the Code levies, in lieu of the regular 50 percent net corporate income tax imposed by Section 11, a 30 percent tax on the gross amount of certain items of income, such as dividends, interest, and compensation, received from sources in Guam by foreign corporations not engaged in business in Guam. Guam is a possession and thus its corporations are "foreign" for United States tax purposes; under the "mirror" theory, United States corporations are "foreign" for Guam tax purposes.

In this case the District Court sustained a deficiency in tax determined by the Commissioner under Section 881 with respect to interest and commissions received from sources in Guam by the taxpayer, a Hawaii corporation, which was not engaged in business in Guam. In a recent case, a panel of this Court held that a California corporation not engaged in business in Guam was not a "foreign" corporation for the purposes of Guam's Section 881 and consequently was not subject to the 30 percent tax on a dividend which it received from its Guam subsidiary. _Atkins Kroll (Guam) Ltd_. v. _Government of Guam_. In the instant case,

a panel of this Court reversed the judgment of the District Court "on the authority" of the Atkins Kroll decision.

We submit that the judgment of the District Court should be affirmed.

1. Assuming the Atkins Kroll case to have been correctly decided, its rationale is not applicable to the instant case. The basis of that decision was the Court's judgment that Congress could not have intended that Guam impose two taxes on corporate earnings -- once when they are earned by the Guam corporation and once when the after-tax earnings are paid to the California corporation as a dividend. The instant case involves interest and commissions which, unlike dividends, are deductible in computing the Guam payor's income tax and are subject only to the 30 percent Section 881 tax in the hands of their recipient. Thus the rationale of Atkins Kroll -- avoidance of multiple taxation of corporate earnings -- has no application here. Indeed, if the result in Atkins Kroll is applied to the instant case, amounts such as interest and commissions will go free of any Guam tax. Congress, in establishing the Guam income tax law, clearly intended that the Government of Guam should be independent of annual appropriations from the federal treasury and should support itself from its own resources.

2. The Atkins Kroll decision was wrongly decided. It is contrary to two basic premises on which Guam's tax is based: (1) That the Internal Revenue Code views corporations and their shareholders as

separate taxable entities and taxes corporate earnings twice, once when they are earned by the corporation and once when the after-tax earnings are paid to their shareholders as dividends; and (2) the United States and Guam are separate and distinct taxing jurisdictions, so that Guam corporations are "foreign" for purposes of the United States income tax and United States corporations are "foreign" for purposes of Guam tax. Whether a corporation is "foreign" or "domestic" is basic to Guam's entire tax system, and consideration of the status of U. S. corporations section by section of the Code produces an endless chain of administrative problems.

3. In the alternative, if Section 881 is not applicable to United States corporations because they are "domestic" corporations for Guam tax purposes, then they are subject to tax in Guam on their world-wide income under Section 11 of the 1954 Code, as are other domestic Guam Corporations (i.e., those incorporated under the laws of Guam). Section 881 expressly states that the tax which it imposes is "in lieu of the taxes imposed" by Section 11. Thus, corporations such as the taxpayer are subject to tax in both the United States and Guam on their world-wide incomes. Indeed, the logical consequence of the Atkins-Kroll decision is that each and every United States corporation is subject to tax in Guam on its world-wide income whether or not it derives income from sources within Guam. This result is contrary to the policy which Congress announced in Section 881, but it appears to be compelled by the Atkins Kroll decision.

ARGUMENT

A CORPORATION ORGANIZED IN THE UNITED STATES IS A "FOREIGN" CORPORATION FOR THE PURPOSES OF THE GUAM TERRITORIAL INCOME TAX

A. Introduction

The issue presented by this case is whether Sayre & Company, Ltd., a corporation organized under the laws of Hawaii, is subject to Guam Territorial income tax on interest and commissions received from Guam sources. Guam has a "mirror" income tax, that is, the income tax laws (including the rates of tax) in force in the United States from time to time constitute the income tax laws of Guam and impose a separate tax payable to the Government of Guam. 3/ Congress adopted the income tax laws of the United States as a "mirror" tax applicable to Guam with the intent that the Government of Guam should be independent of annual Congressional appropriations from the federal treasury and raise revenue from its own sources to carry out its governmental concerns. 4/

3/ Section 31(a) and (b), Organic Act of Guam, as amended in 1958, Appendix, infra. Although the 1958 amendment clarified the Guam law, it is both declaratory of the preexisting law and retroactive. See Section 31(d)(1), Organic Act of Guam, Appendix, infra; Laguana v. Ansell, 102 F. Supp. 919 (Guam), affirmed per curiam, 212 F. 2d 207 (C.A. 9th), certiorari denied, 348 U.S. 830; Jennings v. United States, 168 F. Supp. 781 (Ct. Cl.), vacating opinion, 155 F. Supp. 571; I.T. 4046, 1951-1 Cum. Bull. 57.

4/ On the floor of the House of Representatives Representative Scrivner asked with respect to the proposed amendment which subsequently was enacted as Section 31 of the Organic Act (96 Cong. Record, Part 6, p. 7577):

> * * * I am to understand that there is sufficient property, there are sufficient sources of revenue right there on the island of Guam so that they

(Continued.)

Congress dealt with the problem of modifying the Internal Revenue Code to levy the Guam Territorial income tax by providing in Section 31(e) of the Organic Act, Appendix, infra, that --

> except where it is manifestly otherwise required, the applicable provisions of the Internal Revenue Codes of 1954 and 1939, shall be read so as to substitute "Guam" for "United States" * * * and with other changes in * * * language, including the omission of inapplicable language, where necessary to effect the intent of this section.

For United States income tax purposes, Section 881 of the Internal Revenue Code of 1954, Appendix, infra, imposes a 30 percent tax on certain types of income (e.g., dividends, interest, compensation) received by foreign corporations from sources in the United States. Section 881(a) states --

> In the case of every foreign corporation not engaged in trade or business within the United States, there is hereby imposed for each taxable year, in lieu of the taxes imposed by section 11 [which imposes the tax on corporate net income], a tax of 30 percent of the amount received from sources within the United States as interest * * *, dividends, * * *, compensations, * * * or other fixed or determinable annual or periodical gains, profits, and income * * * .

(Footnote 4 , continued.)

> will be able to set up a tax structure sufficient to carry their own expenses of government without asking for any contribution from the United States to help carry their government cost?

Representative Miller, the proponent of the amendment and Representative Peterson, Chairman of the Committee on Public Lands, replied that this was their understanding. The debate on the point was set out in more detail by the District Court in Laguana v. Ansell, supra (102 F. Supp. 920-921). The Senate concurred. 96 Cong. Record, Part 8, p. 11082.

The tax is levied on the gross amount received; to obviate administrative problems no offsetting deductions are permitted. 5/ This tax is to be withheld and remitted to the Federal Government by the United States payor of the income. Sections 1442, 1461, and 1462 of the Internal Revenue Code of 1954, Appendix, infra. 6/

A "domestic" corporation is one "created or organized in the United States or under the law of the United States or of any State or Territory;" all others are "foreign." Section 7701(a)(4) and (5), 1954 Code, Appendix, infra. For this purpose only Alaska and Hawaii were, before they attained Statehood in 1959, considered Territories; 7/

5/ Section 1.882-3(a)(1), Treasury Regulations on Income Tax (1954 Code), Appendix, infra; H. Rep. No. 2475, 74th Cong., 2d Sess., pp. 9-10 (1939-1 Cum. Bull. (Part 2) 667, 673-674); S. Rep. No. 2156, 74th Cong., 2d Sess., pp. 21-23 (1939-1 Cum. Bull. (Part 2) 678, 691-693); Paul and Mertens, Law of Federal Income Taxation (1939 Cum. Supp.), Secs. 37.15A, 37.15B.

6/ The Foreign Investors Tax Act of 1966, P.L. 89-809, 80 Stat. 1539, Secs. 103-104, altered in some respects the language of Sections 881, 1442, and 1462, but, except as otherwise stated herein, the changes are not significant for the purposes of this case.

Regarding United States taxation of income earned in the United States by foreign corporations and individuals generally, see Roberts and Warren, U.S. Income Taxation of Foreign Corporations and Nonresident Aliens (Practicing Law Institute 1966); 8 Mertens, Law of Federal Income Taxation (1964 rev.), c. 45.

7/ Section 301.7701-5, Treasury Regulations on Procedure and Administration (1954 Code), Appendix, infra. Compare the geographical meaning of "United States" in the Code; prior to 1959 it included "only the States, the Territories of Alaska and Hawaii, and the District of Columbia." Section 7701(a)(9), Internal Revenue Code of 1954 (26 U.S.C. 1958 ed., Sec. 7701). This provision was amended when the Territories became States and it presently makes no reference to Territories. Section 7701(a)(9), 1954 Code, as amended by Alaska Omnibus Act, P.L. 86-70, 73 Stat. 141, Sec. 22(a), and Hawaii Omnibus Act, P.L. 86-624, 74 Stat. 411, Sec. 18(i) (26 U.S.C. 1964 ed., Sec. 7701). And income derived from sources within Guam is not income from sources "within the United States." Sections 861(a) and 862(a), Internal Revenue Code of 1954 (26 U.S.C. 1964 ed., Secs. 861, 862).

Guam is considered a possession, [8] and its corporations are thus foreign, for the purposes of the United States income tax. [9] This is not to say that Guam is a foreign country. It is an "unincorporated territory" of the United States (Sec. 3, Organic Act of Guam, c. 512, 64 Stat. 384 (48 U.S.C. 1964 ed., Sec. 1421a)) -- and thus not a "Territory" as were Alaska and Hawaii; [10] and it is under the sovereignty of the United States (see e.g., Sec. 1.911-1(a)(9), Treasury Regulations on Income Tax (1954 Code)(26 C.F.R., Sec. 1.911-1)).

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8 / See, e.g., Section 932(c), Internal Revenue Code of 1954 (26 U.S.C. 1964 ed., Sec. 932); Sections 1.901-2(c), 1.931-1(a), 1.957-3(b), Treasury Regulations on Income Tax (1954 Code)(26 C.F.R., Secs. 1.901-2, 1.931-1, 1.957-3).

9 / Rev. Rul. 56-616, 1956-2 Cum. Bull. 589.

10 / The legislative history of the Organic Act explains Guam's status as follows (H. Rep. No. 1677, 81st Cong., 2d Sess., p. 12):

> As an unincorporated territory, Guam, like Puerto Rico and the Virgin Islands, is appurtenant to the United States and belongs to the United States but is not a part of the United States. Alaska and Hawaii are incorporated Territories and as such have a right, according to several Supreme Court decisions, to statehood. Unincorporated areas are not integral parts of the United States and no promise of statehood or a status approaching statehood is held out to them.

In asserting deficiencies in tax against the taxpayer with respect to interest and commissions received from Guam sources (i.e., John Sayre, doing business as Kirby and Company) in 1955 through 1957, the Commissioner determined that the taxpayer was a foreign corporation for Guam tax purposes and was subject to tax on the interest and commissions under Section 881 (I-R. 1, 7). The taxpayer sought a redetermination of the deficiencies, contending that it was not subject to tax by Guam in any respect, and, alternatively, that if it was taxable, it was engaged in business in Guam and thus taxable only with respect to its net income. (I-R. 1-5.) In sustaining the Commissioner, the District Court held that the taxpayer was subject to Guam tax on its income from Guam sources and entered judgment against the taxpayer for $6,137, i.e., 30 percent of the total interest and commissions received, $20,456.79. (I-R. 28-29, 30.) While the District Court made no express finding regarding the taxpayer's alternative argument, its conclusion implicitly rejected it. (I-R. 27-29.) On appeal the taxpayer contended that it was not a foreign corporation subject to tax in Guam under Section 881 and that even if it was taxable, it was entitled to offsetting deductions. Appellant's Opening Brief, pp. 5-6, 11-12; Appellant's Reply Brief, pp. 1-2. [11] The panel of the Court reversed the District Court "on the authority" of the Atkins Kroll case, supra.

11/ The taxpayer has abandoned the argument that it was engaged in business in Guam and did not invoke Section 882, Internal Revenue Code of 1954, Appendix, infra. Appellant's Opening Brief, pp. 2, 4, 7, 10; Appellant's Reply Brief, pp. 2, 3.

The District Court, we submit, properly held that the taxpayer was a foreign corporation for Guam tax purposes. The Atkins Kroll rationale has no application to the instant case, and in any event that case was incorrectly decided.

B. The rationale of the Atkins Kroll case has no application to this case

Assuming that the Atkins Kroll case was correctly decided on its facts,[12] the rationale of that decision does not require that the taxpayer in this case be treated as a "domestic" corporation for Guam tax purposes. Unlike the Atkins Kroll case, there is here no multiple taxation problem.

In Atkins Kroll, a Guam corporation engaged in business in Guam, Atkins-Kroll (Guam) Ltd. ("A.K. Guam") was wholly owned (except for qualifying shares) by a California corporation, Atkins, Kroll and Company, Ltd. ("A.K. California"), which was not engaged in business in Guam. In 1958 A.K. Guam declared and paid a $25,000 dividend to A.K. California. The District Court of Guam held that A.K. California was subject to the 30 percent Guam tax on dividends derived from Guam sources by a foreign corporation not engaged in business in Guam.

12/ We do not concede the correctness of that decision, and we urge the Court to disapprove it. See Part C, infra.

On appeal, A.K. Guam, the withholding agent, contended that A.K. California should not be considered a foreign corporation because the total Guam tax imposed on earnings distributed as dividends from Guam would amount to a tax of approximately 65 percent. A panel of this Court sustained A.K. Guam's position. It first decided that, for Guam tax purposes, the definition of a "domestic" corporation should be one "created or organized in GUAM or under the law of GUAM or of any State or Territory" 13/ (emphasis supplied). It then moved to the crux of the problem, i.e., whether the underscored portion should be omitted as "inapplicable language" under Section 31(e) of the Organic Act. Concluding that the phrase must be retained, the Court reasoned that (367 F. 2d, p. 129) --

> with respect to [Section 881], unless the words "or of any State or Territory" are given full application, a manifest and substantial inequity results, for otherwise the combined Guam and Federal tax burden on the income which a California corporation ultimately receives from the business of its Guam subsidiary substantially exceeds the applicable corporate income tax rate under either the laws of Guam or the United States. We find nothing to indicate that Congress

13/ The word "GUAM" indicates a substitution in Section 7701(a)(4), Internal Revenue Code of 1954, Appendix, infra, for the words "United States."

> intended the Guam tax laws to be interpreted so as to reach such a result. 14 /

Thus, the basis for the decision, as the amicus A.K. Guam concedes (Br. 3-5), was the avoidance of an "inequity" presumed to arise from Guam's taxing corporate earnings twice -- once when earned by the corporation and once when paid to its shareholders as a dividend.

However, the instant case involves interest and commissions and such items are deductible from gross income in computing the net income of John Sayre subject to Guam individual income tax. Sections 162 and 163, Internal Revenue Code of 1954 (26 U.S.C. 1964 ed., Secs. 162, 163). Unlike the case of corporate earnings distributed as dividends, which are not deductible and thus are subject to Guam corporate income tax, amounts paid in the form of interest and commissions are deductible by their payor and therefore do not bear Guam income tax. However, like dividends, they constitute taxable income in the hands of their recipient and are

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14 / The Court's reference to "Federal" taxes here is unclear. A.K. Guam paid no tax to the United States on its earnings since for United States tax purposes it was a foreign corporation that neither engaged in business in the United States nor received income from sources in the United States. 1954 Code, Sections 881, 882. If the Court in _Atkins Kroll_ had held that A.K. California was subject to Guam tax under Section 881 on the dividend it received from A.K. Guam, A.K. California would have apparently paid no United States tax on the dividend. It would have been required to include the dividend derived from Guam in its gross income for United States tax purposes, but it would have claimed with respect to the Guam tax paid a foreign tax credit for income taxes paid to a possession (Sections 901, 902, and 904, Internal Revenue Code of 1954, Appendix, _infra_) equal to the United States tax liability incurred with respect to such dividends. See Opening Brief for Appellant, pp. 9-11; _Atkins Kroll (Guam), Ltd. v. Government of Guam_, 367 F. 2d 127 (C.A. 9th).

subject to Guam tax on the recipient, whether the recipient is a Guam citizen (Section 1, Internal Revenue Code of 1954 (26 U.S.C. 1964 ed., Sec. 1), a nonresident alien (including a United States citizen not resident in Guam) (Section 871, Internal Revenue Code of 1954 (26 U.S.C. 1964 ed., Sec. 871),[15/] a Guam corporation (Section 11, Internal Revenue Code of 1954, Appendix, infra), a United States corporation engaged in business in Guam (Section 882, 1954 Code) or a United States corporation not engaged in business in Guam (Section 881, 1954 Code). Such income is derived from sources in Guam (Section 861(a)(1), (2), and (4), Internal Revenue Code of 1954 (26 U.S.C. 1964 ed., Sec. 861)), and Guam is entitled to levy a tax on such income in the same way that the United States taxes Guam corporations on such income derived from United States sources (Rev. Rul. 56-616, 1956-2 Cum. Bull. 589). In making the

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15/ For United States tax purposes Section 871(a) imposes a 30 percent tax on certain amounts (e.g., dividends, interest, and compensation) received from sources within the United States by a "non-resident alien individual" not engaged in business in the United States. A citizen of Guam resident in Guam is considered a nonresident alien for United States tax purposes. Section 932(a), Internal Revenue Code of 1954 (26 U.S.C. 1964 ed., Sec. 932); Sec. 1.932-1(a)(1) Treasury Regulations on Income Tax (1954 Code) (26 C.F.R., Sec. 1.932-1); Rev. Rul. 56, 1953-1 Cum. Bull. 303.

For Guam tax purposes, a United States citizen resident in the United States presumably would be a nonresident alien subject to Guam tax under Section 871 on dividends, interest, and commissions received from Guam sources. Cf. I.T. 2946, XIV -2 Cum. Bull. 109-110 (Virgin Islands).

Code applicable to Guam to levy a Guam Territorial income tax, Congress plainly intended that Guam should be able to raise revenue from sources within Guam for its governmental needs. Laguana v. Ansell, supra; see footnote 4 , supra. Neither the taxpayer nor the amicus A.K. Guam points to anything in the Code, the Organic Act, or the legislative history of Section 31 to indicate that Congress intended that Guam forego taxing income generated from activities or investments within its limits. Its jurisdiction to tax income from within its limits cannot be questioned. Cf. Continental Trading, Inc. v. Commissioner, 265 F. 2d 40 (C.A. 9th), certiorari denied, 361 U.S. 827. Consequently, the District Court properly entered judgment for the Commissioner notwithstanding the Atkins Kroll decision.

A.K. Guam suggests that the decision below may have been based on grounds other than the status of the taxpayer as a foreign corporation and that the decision may be affirmed on those grounds without reaching the question of its status. (Amicus Br. 5-6.) It is suggested that the taxpayer was the alter ego of the payor of the interest and commissions (i.e., that Sayre & Company, Ltd. is a sham), but it is sufficient to note that the taxpayer, the Commissioner, and the District Court accepted the reality of the manner in which John Sayre conducted his business through Kirby and Company in Guam and the taxpayer in Hawaii. (I-R. 1-4, 7, 27-29.) With respect to the

suggestion that the amounts of interest and commissions were excessive and constituted a diversion of taxable income from Guam, it has not been contended that the taxpayer received too much. And even if it be assumed that the payments were excessive, they still constituted income when received by the taxpayer. The District Court found that the amounts had been received (I-R. 28), and they are taxable to the taxpayer notwithstanding whether they were allowed in whole or part as deductible expenses of John Sayre.

A.K. Guam also advances a unique theory of United States-Guam tax relations, i.e., that Guam not tax any income which is taxable by the United States. (Amicus Br. 6-12.) The basic premise of this view is that it matters not whether a tax is paid to Guam or to the United States. (Amicus Br. 7.) In contending that the legislative history supports this position, the amicus quotes from Representative Miller's statement on the House floor during the debate on Section 31 of the Organic Act. (Amicus Br. 8.) It apparently ignores Representative Miller's first sentence ("There will be no direct payment by the Treasury of this country") just as it ignores the following question of Representative Scrivner, to which Representative Miller replied in the affirmative, that the Government of Guam "will be able to set up a tax structure sufficient to carry their own expenses of government without asking for any contributions from the United States." 96 Cong. Record, Part 6, p. 7577;

see footnote 4 , supra. The plain intent of Congress was to free itself of the need to make annual appropriations from the federal treasury and to permit Guam to raise its own revenues by taxing income, including income received by nonresident aliens and foreign corporations from sources within Guam. To adopt the position suggested by A.K. Guam would be to act directly contrary to the clearly expressed intent of Congress.

Moreover, A.K. Guam fails to reconcile its view with the rationale of the decision of this Court in Government of Guam v. Koster, 362 F. 2d 248. In that case, Guam residents who incurred losses in transactions in the United States were allowed to offset such losses against their Guam income. The Court reasoned that since they were taxable by Guam on their world-wide income, they were entitled to claim as deductions their world-wide losses. A.K. Guam's theory with respect to taxing income appears to have been rejected by the Koster case.

A.K. Guam fails to document the "double tax or excessive tax" situations to which it refers. (Amicus Br. 10-11.) Guam imposes only one tax, under Section 881, on interest and commissions which are received by foreign corporations from sources in Guam, and the United States allows credit for such taxes in computing the liability of the recipient for United States taxes. Section 901, 1954 Code.

In the light of what we will say regarding the taxation of corporate earnings distributed as dividends (Part C, infra), it cannot be said that the facts of the Atkins Kroll case present such a situation. And the amicus points to no authority for allowing deductions against the 30 percent tax imposed by Section 881. (Br. 10-11.) The statute makes no such provision. See footnote 5 , supra.

Finally, the amicus argues that its position follows from the intent of Congress that "American business enterprise * * * [in Guam] will have the full protection of American laws and legal procedure." (Amicus Br. 11-12.) However, there is here no question concerning the taxpayer's enjoyment of such advantages; Guam here seeks only to obtain the revenue for providing such benefits. Moreover, Congress has acted expressly in the field of tax benefits for investment in possessions, but none of the several Code provisions applies in the instant case.[16] And Guam had no program granting tax exemptions or subsidies to industry during the years here in question.[17] The

16/ Sections 48(a)(2)(B)(vii), 931, 955(c)(3), Internal Revenue Code of 1954 (26 U.S.C. 1964 ed., Secs. 48, 931, 955); Executive Order No. 11,071, 27 Fed. Register 12875 (1962).

17/ As to the Virgin Islands, see 33 Virgin Islands Code Ann., Sections 4041, 4061, 4071 (1966 Cum. Pocket Supp.); 26 U.S.C. 1964 ed., Sec. 934; H. Rep. No. 1131, 86th Cong., 1st Sess. 306 (1960-2 Cum. Bull. 811, 812-815). As to the Commonwealth of Puerto Rico's much broader program, see 13 Laws of Puerto Rico Ann., Sections 252, 252a, 252b (1966 Cum. Pocket Supp.); Revenue Act of 1926, c. 27, 44 Stat. 9, Section 261, as amended (48 U.S.C. 1964 ed., Sec. 845); Act of March 4, 1927, c. 503, 44 Stat. 1418, Section 1, as amended (48 U.S.C. 1964 ed., Sec. 741).

legislative history to which the amicus refers (Br. 11-12) reflects no intent that taxpayers such as Sayre & Company, Ltd., should receive a tax reduction when they lend credit and license franchises to those doing business in Guam. On the contrary, the pertinent legislative history reflects the intention that Guam should support itself from its own resources, including, under Section 881, taxing interest and commissions paid to foreign corporations from sources within Guam.

In sum, the result in the Atkins Kroll case-- treating a United States (California) corporation as a domestic corporation for Guam Section 881 tax purposes--is limited to the circumstances which existed there. The Court in Atkins Kroll did in fact expressly limit its decision to Section 881 (367 F. 2d, p. 129); the present case merely illustrates the fact that if the decision is to be maintained it should be limited to Section 881 income which is not deductible in computing its payor's Guam income tax, such as dividends. Since there is no multiple taxation in this case, there is no "equitable" reason for not applying the "mirror" and declaring that a United States (Hawaii) corporation such as the taxpayer is "foreign" for Guam tax purposes just as a Guam corporation is "foreign" for United States income tax purposes.

C. *The Atkins Kroll case was wrongly decided*

While it is possible to reconcile this Court's decision in *Atkins Kroll* with the judgment of the District Court in the instant case as we have indicated (Part B, *supra*), we urge that the Court reexamine the premise on which the *Atkins Kroll* case was decided and to disapprove that decision. As we have noted (see footnote 14 , *supra*, and related text), the decision was based on the Court's judgment that Congress could not have intended that Guam tax corporate earnings twice. The decision, however, contains two basic defects: (1) It ignores the fundamental concept in the 1954 Code that a corporation and its shareholders are separate taxable entities, so that corporate income may be taxed once when earned by the corporation and again when received by the shareholders as a dividend; (2) the decision also violates the basic premise on which Guam's tax law is based, i.e., that Guam and the United States are separate and distinct taxing jurisdictions, so that Guam corporations are "foreign" for purposes of the United States income tax and United States corporations are "foreign" for purposes of the Guam tax. We shall first explain how the relevant sections of the 1954 Code operate in the United States and then analyze the changes and substitutions in the language of the Code that are necessary to convert these provisions of United States tax law into the Guam Territorial income tax.

1. Scheme of the 1954 Code

Section 11 of the 1954 Code imposes a tax of approximately 50 percent on the taxable income of "every corporation." 18/ Read literally this section would tax the world-wide income of "every corporation," foreign and domestic, regardless of whether it had any contact with the United States. Domestic corporations are, in fact, taxed by the United States on their world-wide net income. Section 61, Internal Revenue Code of 1954 (26 U.S.C. 1964 ed., Sec. 61) (gross income includes "all income from whatever source derived"); cf. National Paper Co. v. Bowers, 266 U.S. 373, 376.

However, Sections 881 and 882 of the Code provide special treatment for "foreign" corporations: Section 882 limits the Section 11 net corporate income tax on a foreign corporation engaged in business in the United States to its income from sources within the United States; Section 881 imposes in lieu of the Section 11 tax a 30 percent tax on the gross amount of certain items of income (e.g., dividends, interest, compensation) received from sources in the United States by a foreign corporation not engaged in business in the United States.

Thus it is important to determine whether a corporation is "domestic" or "foreign" since (1) a domestic corporation pays a tax

18/ During recent years the rate of the Section 11 tax has varied around 50 percent and for the purposes of this brief we shall use the figure 50 percent.

of approximately 50 percent upon its world-wide income, (2) a foreign corporation engaged in business in the United States pays a tax of approximately 50 percent on its net income from sources within the United States, and (3) a foreign corporation not engaged in business in the United States pays a tax of 30 percent on certain United States source gross income, including dividends, interest, and commissions paid by a United States corporation engaged in business in the United States.

As we have already pointed out (footnote 8 , supra, and related text), Guam is considered to be a "possession" and its corporations are thus "foreign," for United States income tax purposes.

Consequently, if a California or Hawaii corporation pays dividends, interest, or commissions to a Guam corporation not engaged in business in the United States, the United States tax authorities will (1) treat the Guam corporation as a foreign corporation, (2) collect an income tax of approximately 50 percent on the net earnings of the United States corporation under Section 11, and (3) collect a 30 percent tax on the gross dividends, interest and commissions paid by the United States corporation to the foreign (Guam) corporation under Section 881 -- a tax of 30 percent on the interest and commissions and an aggregate tax of approximately 65 percent on the dividends.[19/]

19/ As we have seen, the interest and commissions are deductible for the purposes of computing the United States corporation's net income under Section 11 and thus bear only the 30 percent tax of Section 881. However, the dividends are not deductible in computing corporate taxable income and consequently corporate earnings distributed as dividends are subject to two taxes, a 50 percent tax (Section 11) when they are earned and a 30 percent tax (Section 881) when they are distributed to shareholders.

2. Conversion of the 1954 Code into the Guam Territorial income tax law

For Guam tax purposes, a "foreign" corporation under Section 7701 (a)(4) and (5), substituting "GUAM" for "United States" and omitting "inapplicable language" (Organic Act of Guam, Sec. 31(e)), should be a corporation which is not "created or organized in GUAM or under the law of GUAM or of any State or Territory" (emphasis supplied.)[20]

Since Guam has no states or territories, we submit that the phrase emphasized in Section 7701(a)(4) should be omitted as "inapplicable language" (Section 31(e)). Only if this is done can the Guam tax function like the United States tax. Since a Guam corporation is for purposes of the United States income tax considered a foreign corporation, a United States corporation should for purposes of the Guam income tax be considered a foreign corporation. When a Guam corporation pays dividends, interest, and commissions to a United States corporation not engaged in business in Guam, Guam should be able to collect the same taxes which the United States tax authorities would collect in the reverse situation, i.e., (1) treat the United States corporation as a foreign corporation, (2) collect an income tax of approximately 50 percent on the net earnings of the

20/ The word "GUAM" indicates substitution in place of the words "United States."

Guam corporation under Section 11, and (3) collect a 30 percent tax on the gross dividends, interest, and commissions paid by the Guam corporation to the foreign (United States) corporation under Section 881. As it was for United States tax purposes, the interest and commissions would bear a total tax of 30 percent and earnings distributed as dividends an aggregate tax of approximately 65 percent. See text following footnote 14, supra.

In declining to reach this result in Atkins Kroll, the Court stated that it could "find nothing to indicate that Congress intended the Guam tax laws to be interpreted so as to reach such a result." 367 F. 2d, p. 129. Accordingly, it retained the words "or of any State or Territory" in the phrase "created or organized in GUAM or under the law of GUAM or of any State or Territory" (Section 7701(a)(4)), and interpreted it to make a corporation organized in a State of the United States a domestic corporation for Guam tax purposes. However, examination of the Code demonstrates that Congress clearly did intend the United States (or Guam) to collect taxes aggregating more than 50 percent. This is illustrated by the following examples:

1. If a United States corporation is wholly owned by one or more United States citizens, the domestic corporation pays a 50 percent tax on its net income under Section 11 and, when it pays the after-tax earnings to its shareholders as dividends, they pay

individual income taxes under Section 1, Internal Revenue Code of 1954 (26 U.S.C. 1964 ed., Sec. 1) at rates up to 70 percent. Thus, the combined taxes from the two steps may total as much as 85 percent of the corporation's original earnings.21/

2. If a United States corporation is wholly owned by a foreign corporation which is not engaged in business in the United States, the domestic corporation pays the usual 50 percent corporate income tax under Section 11 and, when the domestic corporation pays the after-tax earnings to its foreign parent as a dividend, the parent pays a 30 percent tax under Section 881 on the gross dividend. Thus, the combined United States tax on the domestic subsidiary and the foreign parent is approximately 65 percent.22/

21/ And State and local taxes may take an additional amount. The New York City and State corporate taxes, for example, amount to almost 11 percent of net income. Administrative Code of New York, City, Title R, City Business Tax, Sections R. 46-3.0, R. 46-4.0, R. 46-20.0, as enacted by L.L. 21, Laws 1966 (CCH New York Tax Reporter, pars. 193-306a, 193-307b, 193-346a) (5 1/2 percent tax); Tax Law, 59 McKinney's Consolidated Laws of New York Annotated, c. 60, Secs. 208-210 (5 1/2 percent tax). The Guam tax here in question is comparable to both the federal and the local income taxes in the United States.

22/ Tax treaties with approximately 25 foreign countries, mostly in Western Europe, have reduced the 30 percent tax to 15 percent or, in some cases, to 5 percent. 4 CCH Standard Federal Tax Reporter (1968), par. 4206.05.

3. The foregoing result is equally true when the foreign parent is a Guamanian corporation, since for purposes of the United States income tax Guam corporations are foreign corporations. Rev. Rul. 56-616, 1956-2 Cum. Bull. 589. Thus, if the facts of the Atkins-Kroll case were reversed so that A.K. Guam was the parent corporation and A.K. California the wholly owned subsidiary, the United States would collect a combined tax of 65 percent on United States earnings paid as dividends to the Guamanian parent. For the purposes of computing the Guam corporate tax of A.K. Guam, Guam would allow credit for the United States tax paid. Sections 901 and 902, 1954 Code.

4. Moreover, this would also be true if the United States corporation was owned by one or more Guamanian citizens. The United States corporation would pay the usual 50 percent United States tax on its earnings and the Guamanian shareholders would be subject to the United States tax of 30 percent of the gross dividends paid to them by the United States corporation. Section 871(a), 1954 Code; see footnote 15, supra. The combined tax paid by the United States corporation and its individual Guamanian shareholders would be 65 percent. Guam would allow credits for United States taxes paid against the Guam tax liability of the Guamanians. Section 901, 1954 Code.

Thus it is clear that the scheme of the Code is generally to collect at least two taxes on corporate income--once when the income is earned by the corporation and once when after-tax income is paid to its shareholder or shareholders as a dividend, and it is not at all

unusual for the combined tax to reach 65 percent. [23] The fact that the shareholders are foreign corporations or citizens affects only the rate of tax imposed at the shareholder level (i.e., whether a graduated tax on net income or a flat 30 percent tax on gross income) and the method of collection (i.e., whether the tax is collected from the shareholder or withheld by the payor corporation), not whether they are taxed at all on dividend income from United States sources.

In applying the Internal Revenue Code to Guam, Congress adopted the same scheme of taxing corporate earnings once when earned and once when distributed. If a Guamanian corporation is owned by one or more Guamanian citizens, Guam collects two taxes which, depending on the individual shareholders' tax brackets, might total as much as 85 percent. Sections 1 and 11, 1954 Code. However, if the same corporation is owned by one or more United States corporations, this Court in Atkins Kroll apparently assumed that Guam would be limited to the collection of only one tax, i.e., on the Guam corporation's net earnings (Section 11), and would have to exempt the recipients of the dividends from Guam tax even though the dividends are clearly from Guam sources. Thus Guam would collect less tax when a Guam corporation is owned by a United States corporation or corporations than when it is owned by Guamanians.

23/ Nor is this pattern of taxation unique to the United States. All six members of the European Economic Community, for example, impose taxes on corporate earnings and then on earnings distributed as dividends, and the aggregate rates exceed the maximum corporate rate imposed. See Radler, Corporate Taxation in the Common Market, II Guides to European Taxation (International Bureau of Fiscal Documentation, Amsterdam 1964), pp. II-A:1 - II-A:11, II-D:6 - II-D:7.

This result clearly violates Congress' intent to give Guam a separate, "mirror" income tax act that would operate in Guam in the same way that the Internal Revenue Code operates within the United States. As we have pointed out, supra, if a Guam corporation has a United States subsidiary, the United States collects two taxes--one from the parent and one from the subsidiary--aggregating 65 percent. However, if a Guam subsidiary is owned by a United States corporation, the Atkins Kroll decision apparently results in Guam collecting only one tax of 50 percent.

Moreover, notwithstanding the Atkins Kroll decision, if a Guam corporation is owned by one or more individual United States citizens, Guam apparently collects two taxes aggregating 65 percent; it collects the usual 50 percent tax on the domestic corporation's earnings under Section 11 and then a 30 percent tax under Section 871, 1954 Code, supra, when the corporate earnings are distributed as dividends to nonresident alien individuals (i.e., United States citizens resident in the United States).[24/] Therefore, if a Guam corporation is wholly owned by a United States corporation, Guam under the Atkins Kroll decision collects only a 50 percent tax, but if the Guam corporation is owned by a United States individual, Guam collects combined taxes of 65 percent. Moreover, if the stock of the Guam corporation were owned one-half by a United States corporation and one-half by an individual

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24/ Presumably a United States citizen resident in the United States would be a nonresident alien for Guam tax purposes. Cf. I.T. 2946, XIV-2 Cum. Bull. 109-110 (1935) (Virgin Islands). And see footnote 15, supra.

United States citizen, Guam would collect a combined tax of 50 percent on the corporate earnings distributed as dividends to the United States corporation and combined taxes of 65 percent on the corporate earnings distributed as dividends to the United States individual.

In addition to the anomalies created by the Atkins Kroll decision with respect to the treatment of dividends, the Court's definition of foreign and domestic corporations as applied in the instant case would apparently result in Guam not collecting any tax on other amounts covered by Section 881 which are deductible items in computing the net income of the Guam payor (such as interest, salaries, and compensation) and which are subject to tax only under Section 881. Since such amounts are deductible in computing net income subject to the regular Guam individual or corporate income tax (Sections 1, 11), they do not bear any Guam tax. As we have pointed out (Part B, supra), exempting these amounts from any Guam tax is plainly contrary to the intent of Congress and reinforces the view that the decision is unsound.

Moreover, the Atkins Kroll decision leads to problems with respect to the administration of other provisions of the Code, since whether corporations are foreign or domestic is basic to Guam's tax system. 25/ Indeed, in the Atkins Kroll case itself, A.K. Guam suggested that the

25/ See, e.g., Sections 243(d), 245, 301(b)(1)(C), 367, 902, 951-964, 1246-1248, 1504(b)(3), Internal Revenue Code of 1954 (26 U.S.C. 1964 ed., Secs. 243, 245, 301, 367, 902, 951-964, 1246-1248, 1504).

rule which it sought had to be a qualified one, so that United States corporations were "domestic" for Guam's Section 881 but "foreign" for its Section 882 (taxing "foreign" corporations engaged in business in Guam). 26/ It was apparently in response to this suggestion that the Court expressly limited its decision to Section 881. 367 F. 2d, p. 129. Such piecemeal consideration of the many Code provisions will lead only to administrative chaos.

In its amicus curiae brief filed in the instant case, the taxpayer in Atkins Kroll suggests that the multiple taxes imposed on corporate earnings by Guam are (p. 4) "particularly harsh because the parent-subsidiary relationship involved in Atkins Kroll is one to which Congress has given special treatment for the specific purpose of preventing an excessive combined foreign and federal tax burden; see Internal Revenue Code § 902." The amicus correctly describes the function of Section 902 of the 1954 Code, i.e., "foreign taxes paid by a subsidiary are to be deemed paid by the parent for purposes of a credit against federal taxes" (p. 4). However, it does not note, as it did in its brief in Atkins Kroll, 27/ that the so-called "excessive * * * tax" results despite the allowance of the Section 902 credit and that the tax was produced by the levy of two Guam taxes, not Guam and United

26/ Opening Brief For Appellant, pp. 18-19; Atkins Kroll (Guam) Ltd. v. Government of Guam, supra.

27/ Opening Brief For Appellant, pp. 9-11; Atkins Kroll (Guam) Ltd. v. Government of Guam, supra.

States taxes. And, as we have shown, supra, there is no doubt but that Congress intended that multiple taxes be imposed.

Finally, the argument pressed by the taxpayer in the Atkins Kroll case that it should be taxed at the same rates applicable had it established a branch in Guam instead of a corporate subsidiary is without merit. In electing to do business in Guam through a subsidiary, A.K. California's management presumably weighed the various disadvantages, including tax, against the advantages, such as limited liability, freedom of the parent from regulation by Guam, and transferability of the equity interest in the subsidiary. Having elected the corporate form, it cannot now claim a right to be taxed as if it had chosen a branch operation. See National Carbide Corp. v. Commissioner, 336 U.S. 422, 438-439; Moline Properties, Inc. v. Commissioner, 319 U.S. 436.

As we have demonstrated, the Section 881 tax is imposed by the United States with respect to "foreign" corporations, including those of Guam, receiving dividends and other income from United States sources; Guam, with its "mirror" income tax, should levy a similar tax on "foreign" corporations, including those of the United States, receiving such amounts from sources within Guam. We respectfully urge the Court to re-examine the Atkins Kroll decision in the light of the foregoing arguments and to disapprove it. Otherwise, an anomalous result will be reached in which a United States corporation will be "domestic" for both Guam and United States tax purposes, while a Guam corporation will be "domestic" to Guam but "foreign" for United States tax purposes.

D. <u>In the alternative, the taxpayer is taxable on world-wide income under Section 11</u>

Section 881 expressly states that it levies its 30 percent tax n lieu of the taxes imposed by section 11," the regular 50 percent rporate income tax imposed on the income of "every corporation." ction 11(d)(4) provides that the tax imposed by Section 11(a) does t apply to a corporation subject to tax under Section 881. Thus, en a corporation is exempted from tax under Section 881 because it not a "foreign" corporation, it is automatically subject to tax der Section 11(a). In deciding the Atkins Kroll case, the Court parently assumed that if A. K. California were treated as a omestic" corporation under Section 881 for Guam tax purposes, A. K. lifornia would be exempt from all Guam corporate income taxes, and ht the earnings of A.K. Guam distributed to A.K. California would be subjected to an additional Guam income tax. However, in view the express language in Section 11 and Section 881, the actual sequence of the Atkins Kroll decision exempting A.K. California m Guam's Section 881 tax was to bring into effect Guam's Section 11 a. This is consistent with the Court's holding; if A.K. California s not foreign for Guam tax purposes, it must be domestic. Guam taxes t domestic corporations, as does the United States, under Section 11.

However, the consequence of applying Section 11 to California is to subject it to Guam tax on its world-wide income.

Guam taxes, as does the United States, its citizens and corporations on their world-wide income. Government of Guam v. Koster, 362 F. 2d 248, 249 (C.A. 9th) ("citizens of Guam are liable for a Territorial income tax on gross income derived from business transacted on mainland United States"); cf. National Paper Co. v. Bowers, supra. As a result, if the taxpayer in the instant case is to be treated as a "domestic" corporation for Guam tax purposes, it is subject to tax in Guam on its world-wide net income under Section 11. Indeed, each and every United States corporation, whether or not it derives income from sources within Guam, would be a "domestic" corporation for Guam tax purposes and would be subject to tax in Guam on its world-wide income. This result is contrary to the express policy announced by Congress in Section 881, but appears to be compelled by the Atkins Kroll decision. 28/

CONCLUSION

For the foregoing reasons, the judgment of the District Court is correct and should be affirmed.

Respectfully submitted,

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28/ Consequently, if on rehearing the Court maintains the decision of the three judge panel in this case, the judgment below should be reversed and the case remanded for a redetermination of the tax liability of Sayre & Company, Ltd., under Section 11.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: 29 day of March, 1968.

J Edward Shillingburg
J. Edward Shillingburg

APPENDIX

Internal Revenue Code of 1954:

SEC. 11. TAX IMPOSED.

(a) Corporations In General.--A tax is hereby imposed for each taxable year on the taxable income of every corporation. * * *

*   *   *

(d) Exceptions.--Subsection (a) shall not apply to a corporation subject to a tax imposed by--

*   *   *

(4) section 881(a) (relating to foreign corporations not engaged in business in United States).

(26 U.S.C. 1964 ed., Sec. 11)

SEC. 881. TAX ON FOREIGN CORPORATIONS NOT ENGAGED IN BUSINESS IN UNITED STATES.

(a) Imposition of Tax.--In the case of every foreign corporation not engaged in trade or business within the United States, there is hereby imposed for each taxable year, in lieu of the taxes imposed by section 11, a tax of 30 percent of the amount received from sources within the United States as interest (except interest on deposits with persons carrying on the banking business), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income (including amounts described in section 631 (b) and (c) which are considered to be gains from the sale or exchange of capital assets).

*   *   *

(26 U.S.C. 1964 ed., Sec. 881)

SEC. 882. TAX ON RESIDENT FOREIGN CORPORATIONS.

(a) Imposition of Tax.--A foreign corporation engaged in trade or business within the United States shall be taxable as provided in section 11.

(b) Gross Income.--In the case of a foreign corporation, gross income includes only the gross income from sources within the United States.

(c) Allowance of Deductions and Credits.--

*   *   *

(2) Allocation of deductions.--In the case of a foreign corporation the deductions shall be allowed only if and to the extent that they are connected with income from sources within the United States; and the proper apportionment and allocation of the deductions with respect to sources within and without the United States shall be determined as provided in part I, under regulations prescribed by the Secretary or his delegate.

*   *   *

(26 U.S.C. 1964 ed., Sec. 882)

SEC. 901 [as amended by Sec. 3(b), Act of September 14, 1960 P.L. 86-780, 74 Stat. 1010]. TAXES OF FOREIGN COUNTRIES AND OF POSSESSIONS OF UNITED STATES.

(a) Allowance of Credit.--If the taxpayer chooses to have the benefits of this subpart, the tax imposed by this chapter shall, subject to the limitation of section 904, be credited with the amounts provided in the applicable paragraph of subsection (b) plus, in the case of a corporation, the taxes deemed to have been paid under section 902. * * *

(b) Amount Allowed.--Subject to the limitation of section 904, the following amounts shall be allowed as the credit under subsection (a):

(1) Citizens and domestic corporations.--In the case of a citizen of the United States and of a domestic corporation, the amount of any income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States; * * *

*   *   *

(26 U.S.C. 1964 ed., Sec. 901)

SEC. 902. CREDIT FOR CORPORATE STOCKHOLDER IN FOREIGN CORPORATION.

(a) Treatment of Taxes paid by Foreign Corporation.--For purposes of this subpart, a domestic corporation which owns at least 10 percent of the voting stock of a foreign corporation from which it receives dividends in any taxable year shall be deemed to have paid the same proportion of any income, war profits, or excess profits taxes paid or deemed to be paid by such foreign corporation to any foreign country or to any possession of the United States, on or with respect to the accumulated profits of such foreign corporation from which such dividends were paid, which the amount of such dividends bears to the amount of such accumulated profits.

* * *

(26 U.S.C. 1964 ed., Sec. 902)

SEC. 904. LIMITATION ON CREDIT.

(a) Limitation.--The amount of the credit in respect of the tax paid or accrued to any country shall not exceed the same proportion of the tax against which such credit is taken which the taxpayer's taxable income from sources within such country (but not in excess of the taxpayer's entire taxable income) bears to his entire taxable income for the same taxable year.

* * *

(26 U.S.C. 1964 ed., Sec. 904)

SEC. 1442. WITHHOLDING OF TAX ON FOREIGN CORPORATIONS.

In the case of foreign corporations subject to taxation under this subtitle not engaged in trade or business within the United States, there shall be deducted and withheld at the source in the same manner and on the same items of income as is provided in section 1441 or section 1451 a tax equal to 30 percent thereof; except that, in the case of interest described in section 1451 (relating to tax-free covenant bonds), the deduction and withholding shall be at the rate specified therein.

(26 U.S.C. 1964 ed., Sec. 1442)

SEC. 1461. RETURN AND PAYMENT OF WITHHELD TAX.

Every person required to deduct and withhold any tax under this chapter shall, on or before March 15 of each year, make return thereof and pay the tax to the officer designated in section 6151. Every such person is hereby made liable for such tax and is hereby indemnified against the claims and demands of any person for the amount of any payments made in accordance with the provisions of this chapter.

(26 U.S.C. 1964 ed., Sec. 1461)

SEC. 1462. WITHHELD TAX AS CREDIT TO RECIPIENT OF INCOME.

Income on which any tax is required to be withheld at the source under this chapter shall be included in the return of the recipient of such income, but any amount of tax so withheld shall be credited against the amount of income tax as computed in such return.

(26 U.S.C. 1964 ed., Sec. 1462)

SEC. 7701. DEFINITIONS.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof--

* * *

(4) Domestic.--The term "domestic" when applied to a corporation or partnership means created or organized in the United States or under the law of the United States or of any State or Territory.

(5) Foreign.--The term "foreign" when applied to a corporation or partnership means a corporation or partnership which is not domestic.

* * *

(26 U.S.C. 1964 ed., Sec. 7701)

Organic Act of Guam, c. 512, 64 Stat. 384:

Sec. 31. The income-tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam.

(48 U.S.C. 1952 ed., Sec. 1421i.)

Sec. 31 [as amended by Sec. 1, Act of August 20, 1958, P.L. 85-688, 72 Stat. 681].

(a) The income-tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam.

(b) the income-tax laws in force in Guam pursuant to subsection (a) of this section shall be deemed to impose a separate Territorial income tax, payable to the government of Guam, which tax is designated the "Guam Territorial income tax".

(c) The administration and enforcement of the Guam Territorial income tax shall be performed by or under the supervision of the Governor. Any function needful to the administration and enforcement of the income-tax laws in force in Guam pursuant to subsection (a) of this section shall be performed by any officer or employee of the government of Guam duly authorized by the Governor (either directly, or indirectly by one or more redelegations of authority) to perform such function.

(d) (1) The income-tax laws in force in Guam pursuant to subsection (a) of this section include but are not limited to the following provisions of the internal Revenue Code of 1954, where not manifestly inapplicable or incompatible with the intent of this section: Subtitle A (not including chapter 2 and section 931); chapters 24 and 25 of subtitle C, with reference to the collection of income tax at source on wages; and all provisions of subtitle F which apply to the income tax, including provisions as to crimes, other offenses, and forfeitures contained in chapter 75. For the period after 1950 and prior to the effective date of the repeal of any provision of the Internal Revenue Code of 1939 which corresponds to one or more of those provisions of the Internal Revenue Code of 1954 which are included in the income-tax laws in force in Guam pursuant to subsection (a) of this section, such income-tax laws include but are not limited to such provisions of the Internal Revenue Code of 1939.

(2) The Governor or his delegate shall have the same administrative and enforcement powers and remedies with regard to the Guam Territorial income tax as the Secretary of the Treasury, and other United States officials of the executive branch, have with respect to the United States income tax. Needful rules and regulations for enforcement of the Guam Territorial income tax shall be prescribed by the Governor. The Governor or his delegate shall have the authority to issue, from time to time, in whole or in part, the text of the income-tax laws in force in Guam pursuant to subsection (a) of this section.

(e) In applying as the Guam Territorial income tax the income-tax laws in force in Guam pursuant to subsection (a) of this section, except where it is manifestly otherwise required, the applicable provisions of the Internal Revenue Codes of 1954 and 1939, shall be read so as to substitute "Guam" for "United States", "Governor or his delegate" for "Secretary or his delegate", "Governor or his delegate" for "Commissioner of Internal Revenue" and "Collector of Internal Revenue", "District Court of Guam" for "district court" and with other changes in nomenclature and other language, including the omission of inapplicable language, where necessary to effect the intent of this section.

* * *

(h) (1) Notwithstanding any provision of section 22 of this Act or any other provision of law to the contrary, the District Court of Guam shall have exclusive original jurisdiction over all judicial proceedings in Guam, both criminal and civil, regardless of the degree of the offense or of the amount involved, with respect to the Guam Territorial income tax.

(2) Suits for the recovery of any Guam Territorial income tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, under the income-tax laws in force in Guam, pursuant to subsection (a) of this section, may, regardless of the amount of claim, be maintained against the government of Guam subject to the same statutory requirements as are applicable to suits for the recovery of such amounts maintained against the United States in the United States district courts with respect to the United States income tax.

When any judgment against the government of Guam under this paragraph has become final, the Governor shall order the payment of such judgments out of any unencumbered funds in the treasury of Guam.

* * *

(4) A civil action for the collection of the Guam Territorial income tax, together with fines, penalties, and forfeitures, or for the recovery of any erroneous refund of such tax, may be brought in the name of and by the government of Guam in the District Court of Guam or in any district court of the United States or in any court having the jurisdiction of a district court of the United States.

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(48 U.S.C. 1964 ed., Sec. 1421i)

Treasury Regulations on Income Tax (1954 Code):

§ 1.882-3 Deductions allowed foreign corporations.

(a) Nonresident foreign corporations--(1) General. For purposes of computing the tax imposed by section 881(a) and described in § 1.881-2, a nonresident foreign corporation shall not be allowed any deductions, since the tax is imposed upon the gross amount received from sources within the United States.

* * *

(26 C.F.R., Sec. 1.882-3.)

Treasury Regulations on Procedure and Administration (1954 Code):

§ 301.7701-5 Domestic, foreign, resident, and nonresident persons.

A domestic corporation is one organized or created in the United States, including only the States (and during the periods when not States, the Territories of Alaska and Hawaii), and the District of Columbia, or under the law of the United States or of any State or Territory. A foreign corporation is one which is not domestic. A domestic corporation is a resident corporation even though it does no business and owns no property in the United States. A foreign corporation engaged in trade or business within the United States is referred to in the regulations in this chapter as a resident foreign corporation, and a foreign corporation not engaged in trade or business within the United States, as a nonresident foreign corporation. * * *

(26 C.F.R., Sec. 301.7701-5.)